

The University of New Hampshire Law Review

Volume 18 | Number 1

Article 36

11-20-2019

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Kate Stith & Claire Blumenthal

The *Dartmouth College* Case and the Founding of Historically Black Colleges

18 U.N.H. L. REV. 27 (2019)

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I. FORGING THE CONCEPT OF A PRIVATE CHARITABLE CORPORATION	28
II. JUSTICE STORY'S EXPANSIVE UNDERSTANDING OF CORPORATE CIVIL RIGHTS	31
III. PUBLIC EDUCATION AND AFRICAN-AMERICANS AFTER THE CIVIL WAR	35
IV. THE FOUNDING OF BLACK COLLEGES	37

At the heart of the Dartmouth College campus, sheltered by Webster Hall's portico, a bronze plaque reads: "Founded by Eleazer Wheelock; Refounded by Daniel Webster."¹ A reference to the *Dartmouth College* case, the inscription commemorates the decision's pivotal role in the school's survival. The Supreme Court decision's transformational impact, however, extends far beyond Hanover.

I. FORGING THE CONCEPT OF A PRIVATE CHARITABLE CORPORATION

Before the Supreme Court decided the *Dartmouth College* case in 1819, American common law jurisprudence did not clearly distinguish between public and private institutions of higher learning.² Neither state legislatures nor courts addressed whether state-chartered charitable institutions remained "public"—and subject to plenary legislative oversight—if their funding sources were private.³ Moreover, even if privately funded eleemosynary corporations could be called "private," it was unclear what protections, if any, that designation conferred against state interference.⁴

¹ MAURICE G. BAXTER, *DANIEL WEBSTER & THE SUPREME COURT* 109 (1966).

² See *Trustees of Dartmouth Coll. v. Woodward*, 1 N.H. 111 (1817). The opinion of New Hampshire's highest court, the Superior Court of Judicature, declined to address the broader legal question concerning the difference, if any, between public and private colleges. Focusing on the facts of the case before it, the court noted that "whether an incorporated college . . . must be viewed as a public or as a private corporation" in all cases "it is not necessary now to decide, because it does not appear that *Dartmouth College* was subject to any private visitation whatever." See also George Thomas, *Rethinking the Dartmouth College Case in American Political Development: Constituting Public and Private Education Institutions*, in 29 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 23, 24 (2015) (noting "the distinction between 'public' and 'private' educational institutions does not accurately capture American colleges in existence in the late eighteenth and early nineteenth centuries"); John S. Whitehead & Jurgen Herbst, *How to Think About the Dartmouth College Case*, in 26 *HIST. OF EDUC. QUART.* 333, 333–34, 343 (1986) (Whitehead asserting that, far from existing prior to the 1819, the distinction between private and public institutions did not develop until after the Civil War; both authors acknowledge, however, that the Supreme Court's decision in *Dartmouth College* is a major obstacle to overcome in this argument).

³ See generally JOHN S. WHITEHEAD, *THE SEPARATION OF COLLEGE AND STATE: COLUMBIA, DARTMOUTH, HARVARD AND YALE, 1776-1876*, 9–52 (1973) (recounting history of "alliances between college and states, 1775-1820," and noting uncertainty regarding state authority in the absence of acquiescence by the college).

⁴ *Id.* See also ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 78 (2018) (discussing how, before the *Dartmouth College* case, "[t]he contract clause only protected private parties, like individuals, from having their existing contracts interfered with by the government."); *id.* at 80 (noting that the idea "that corporations were private

A 1790 decision by Virginia's highest court crystallized the legal issue and presaged (not coincidentally) the *Dartmouth College* case.⁵ In *Bracken v. Visitors of William and Mary College*, the Virginia Supreme Court of Appeals held that state courts could not interfere with the governance of the College of William and Mary because it was a "private Eleemosynary institution" founded with "mere charitable donations."⁶ The Court agreed with the attorney for William and Mary, future Chief Justice John Marshall,⁷ that the "bounty" the Virginia legislature subsequently contributed was just one more "donation to an old foundation" that, "though made by the public," did not change the College's fundamental identity.⁸ Nor did it matter that William and Mary's purpose of higher education "concern[ed] the public."⁹ The 1790 decision noted in passing that often "[c]olleges and hospitals are classed together as private . . . [and are] subject to the will of the founder."¹⁰

But the Virginia Court's understanding was far from universally accepted. In 1804, the United States Supreme Court held that "the act of incorporation which gives it existence," not its founding funding source, determined a state-chartered insurance company's public or private status.¹¹ This was the view adopted by New Hampshire's highest court, the Superior Court of Judicature, in the first stage of the *Dartmouth College* case.¹²

The New Hampshire Court noted that Dartmouth College's purpose was plainly public;¹³ the College was founded, in the words of its Charter, "for the education

entities immunized by the Constitution's contract clause from state takeover" was "a principle the law had never previously recognized explicitly" prior to the case).

⁵ *Bracken v. Visitors of William & Mary Coll.*, 7 Va. (3 Call) 573 (1790).

⁶ *Id.* at 591–93.

⁷ The 35-year-old Marshall had studied law and been elected to the Phil Beta Kappa Society at William and Mary, see <https://law.wm.edu/about/ourhistory/John%20Marshall,%20the%20Great%20Chief%20Justice.php> [<https://perma.cc/U6MF-H47L>] (last visited Sept. 14, 2019). The future Chief Justice's arguments to Virginia's highest court "foreshadowed his reasoning in the Dartmouth case," EDWIN D. DURYEA AND DONALD T. WILLIAMS, *THE ACADEMIC CORPORATION: A HISTORY OF COLLEGE AND UNIVERSITY GOVERNING BOARDS* 111 (2013). See also Florian Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259, 266 (1966) (noting that John Marshall faced the same issue both as attorney and as Chief Justice).

⁸ *Bracken*, 7 Va. at 591–93.

⁹ *Id.* at 593.

¹⁰ *Id.* at 591.

¹¹ *Head & Amory v. Providence Ins. Co.*, 2 Cranch 127, 128 (1804).

¹² *Trustees*, 1 N.H. at 120 (stating "if such a corporation [as Dartmouth] is not to be considered as a public corporation, it would be difficult to find one that could be so considered.").

¹³ *Id.* at 117–20.

[and] instruction of [y]outh of the [I]ndian tribes . . . and also of *English* youth and any others.”¹⁴ Though the Court speculated that “whether a corporation is to be considered as public or private, depends on the objects for which its franchises are to be exercised,”¹⁵ it found that Dartmouth’s public purpose alone was not dispositive.¹⁶ Instead, the terms of a corporation’s charter determined its public or private identity.¹⁷ If the charter conferred property rights and beneficial interests to the chartering state, the corporation was public.¹⁸ If these rights belonged to the incorporators, the corporation was private.¹⁹ The unanimous opinion, written by the well-respected Chief Justice William Richardson, concluded that Dartmouth could not be classified as a private institution because its trustees had no “private beneficial interest, either in their franchises or [the] property [of the College].”²⁰ Indeed, the New Hampshire Court held that the Dartmouth trustees, as fiduciaries of a public corporation, were ipso facto public officers of the state.²¹

When the *Dartmouth College* case reached the Supreme Court, the Justices rejected the New Hampshire Court’s conclusion that Dartmouth was a public institution. Chief Justice Marshall’s opinion was narrow. It was limited to *this* publicly chartered “eleemosynary” institution and stated that “it can require no argument to prove, that the circumstances of this case constitute a contract . . . Dartmouth College is really endowed to private individuals . . . it is then an eleemosynary . . . and so far as respects its funds, a private corporation.”²²

¹⁴ CHARTER OF DARTMOUTH COLLEGE (1769), <https://www.dartmouth.edu/~trustees/docs/charter-2010.pdf> [<https://perma.cc/XS5S-VK66>], cited in *Trustees*, 1 N.H. at 118.

¹⁵ *Trustees*, 1 N.H. at 117–18.

¹⁶ *Id.* at 118–20.

¹⁷ *Id.*

¹⁸ *Id.* at 119–20.

¹⁹ *Id.* at 116–17, 120 (“Public corporations are those which are created for public purposes, and whose . . . corporators have no private beneficial interest, either in their franchises of their property . . . A gift to a corporation created for public purposes is in reality a gift to the public . . . [If] such a corporation [as Dartmouth were] not to be considered as a public corporation, it would be difficult to find one that could be so considered.”).

²⁰ *Id.* at 117.

²¹ *Id.* at 119 (“The office of trustee of Dartmouth College is, in fact, a public trust, as much so as the office of governor, or of judge of this court”).

²² *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 627, 633–34 (1819). See also Christopher M. Joseph, *Joseph Story and the Dartmouth College Case: Expansion of the Contract Clause*, 1 FAIRMOUNT FOLIO: J. HISTORY 17, 21 (1996) (noting that Marshall, instead of making a broad vested rights argument, “focused on the contract clause’s application to Dartmouth College as a private eleemosynary institution.”).

Justice Marshall echoed the decision of Virginia's highest court in 1790: because of its private founding and funding, the institution was private,²³ despite its public charter and purpose.²⁴ Accordingly, the Constitution's Contracts Clause protected Dartmouth's contracts—including, according to the Court, the Charter the British Crown granted it in 1769—from unilateral modification by the State of New Hampshire.²⁵

II. JUSTICE STORY'S EXPANSIVE UNDERSTANDING OF CORPORATE CIVIL RIGHTS

By its terms, Justice Marshall's opinion applied only to private, eleemosynary institutions. But Justice Joseph Story's concurring opinion pronounced that the Court's *Dartmouth College* decision liberated *all* private corporations, whether commercial or charitable.²⁶ In Story's view, only where a corporation's "whole interests and franchises [were] the exclusive property and domain of the government itself" could the government "regulate, control and direct the corporation."²⁷ Both Justices embraced Daniel Webster's argument that, just as states could not revoke a land grant recipient's property rights, they could not infringe on a private corporation's privileges once conferred by contract, without having reserved that power explicitly.²⁸ As historians Oscar Handlin and Mary F.

²³ *Trustees*, 17 U.S. at 632–35.

²⁴ See R. Kent Newmyer, *Justice Joseph Story's Doctrine of Public and Private Corporations and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 831 (1976) [hereinafter, Newmyer, *Justice Joseph Story's Doctrine*] (noting that Chief Justice Marshall in *Dartmouth College* "ignor[ed] his own statement in *Providence Insurance Co.*" by maintaining that funding source determines corporate status). See also *id.* at 826–28 (discussing the evolution of the Court's conception of corporate status leading up to the *Dartmouth College* case).

²⁵ *Trustees*, 17 U.S. at 645, 652, 654 (finding a violation of Article 1, Section 10 of the United States Constitution, which prohibits states from passing any "Law impairing the Obligation of Contracts").

²⁶ *Id.* at 666, 668–69 (Story, J., concurring) ("[S]trictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution.").

²⁷ *Id.* at 671–72; see also FRANCIS N. STITES, *PRIVATE INTEREST & PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE*, 1819 at 84–85 (1972) (discussing Justice Story's view of private property and corporations, as well as his expansion of the case's holding to encompass all corporations).

²⁸ *Trustees*, 17 U.S. at 567–68 (Marshall, C.J.); *id.* at 682 (Story, J., concurring). See also WINKLER, *supra* note 4, at 82 (discussing Webster's argument that, as with private property, lawmakers could

Handlin explained in 1953, “[When] Marshall and Story held in 1819 that the charter was a contract protected by the Federal Constitution . . . a sturdy bulwark against legislative interference [was] erected around the corporation.”²⁹ The Handlins’ interpretation endures; published last year, economic historian Adam Winkler’s history of U.S. corporate law concludes that *Dartmouth College* “fundamentally reconceived the nature of the American corporation.”³⁰

This canonical interpretation of the case’s significance tends to emphasize how its protections against government interference transformed American corporate law and the national economy. Private corporations grew in number, size, and power after the *Dartmouth College* decision, buttressed by its new property protections.³¹

But exclusive focus on the case’s implications for private corporations serving private purposes misses its import for other types of private institutions: those, like Dartmouth, engaged in higher education. In the *Dartmouth College* decision, the Supreme Court explicitly acknowledged a category of corporation for the first time—what Marshall called “private eleemosynary institutions,” and what we now call private charitable corporations or private nonprofits. Despite serving public purposes, these private institutions were still, in Marshall’s words, “artificial being[s];”³² they were “no more a state instrument, than a natural person [pursuing public goals like education] would be.”³³

The idea of an “artificial” person was not new.³⁴ In constitutionalizing the concept, however, the Supreme Court insulated private educational entities from

not “lawfully snatch away” the rights conferred by a corporation’s charter); *id.* at 87 (discussing Justice Story’s “reservation clause”); R. Kent Newmyer, *John Marshall as a Transitional Jurist: Dartmouth College v. Woodward and the Limits of Omniscient Judging*, 32 CONN. L. REV. 1665, 1673 (2000) (discussing Justice Story’s focus on a corporation’s character being determined by its founding financial sources); Newmyer, *Justice Joseph Story’s Doctrine*, *supra* note 24, at 832–36 (1976) (discussing Justice Story’s strategic vision for how the *Dartmouth College* case would transform corporate law and lead to growth in use of the corporate form in the United States).

²⁹ Oscar Handlin and Mary F. Handlin, *Origins of the American Business Corporation*, in ENTERPRISE AND SECULAR CHANGE 119 (Frederic C. Lane and Jelle C. Riemersma, eds., 1953).

³⁰ WINKLER, *supra* note 4, at 85–86.

³¹ *Id.* at 87. See also Art. IV: *Manufacturing Corporations*, 2 AM. JURIST & L. MAG. 92, 94 (Jul. 1829) (providing a contemporaneous account of the growth in private corporations in America, especially compared to other countries like England, in the decade following the *Dartmouth College* decision).

³² *Trustees*, 17 U.S. at 636, 638 (Marshall, C.J.).

³³ *Id.* at 636. See also *id.* at 645 (declaring that “the law of this case is the law of all.”).

³⁴ Newmyer, *Justice Joseph Story’s Doctrine*, *supra* note 24, at 837.

government interference and provided a legal pathway for them to claim many of the same civil rights the Constitution bestowed on natural persons.³⁵

Justice Story himself recognized the potential civil rights significance of the *Dartmouth College* decision. In a private letter to legal scholar and jurist, Chancellor James Kent of New York, Story expressed his hope that the *Dartmouth College* decision would shield all non-state institutions from “any undue encroachments upon [their] civil rights, which the passions or the popular doctrines of the day may stimulate our State Legislatures to adopt.”³⁶

As Justice Story described, the *Dartmouth College* case involved a state government seeking to secularize and broaden an institution’s curriculum and public role. The Jeffersonian Republicans had ousted the Federalists in the 1816

³⁵ Winkler ultimately asserts that in *Dartmouth College* and later cases, the Supreme Court recognized corporations’ civil rights by a transitive property. He argues that, rather than existing as legal persons independently, corporations merely assert their members’ individual rights. See WINKLER, *supra* note 4, at 66–68, 86–87. The Court’s language in the *Dartmouth* decision, however, tracks the traditional interpretation more closely. Chief Justice Marshall’s opinion states that the “properties” of this “artificial being . . . are considered as the same, and may act as a single individual.” *Trustees*, 17 U.S. at 636. Story’s opinion does note that as “an artificial person . . . [a corporation’s rights] must be exercised through the medium of its natural members,” but this qualification appears more logistical than substantive—that as practical matter, corporations rely on their members to pursue their purposes and civil rights. *Trustees*, 17 U.S. at 667 (Story, J., concurring). Justice Story goes on to emphasize that because of their “collective character . . . [corporations] posses[s] certain immunities, privileges and capacities . . . which do not belong to the natural persons composing it,” that their artificial personhood is “considered as subsisting in the corporation itself, as distinctly as if it were a real personage,” and that “a corporation may sue and be sued by its own members . . . as with any strangers.” *Id.* at 667–668. Each of these clauses strongly suggests a legal entity endowed with independent, recognizable rights and status, rather than one reliant on its members’ rights. See also Newmyer, *Justice Joseph Story’s Doctrine*, *supra* note 24, at 827–28 (discussing how the *Dartmouth College* Case impacted the understanding of corporation’s rights and their legal source).

³⁶ JOSEPH STORY, *LIFE AND LETTERS OF JOSEPH STORY* 331 (William W. Story ed., 1851). Story’s exchange with Chancellor Kent, facilitated by Daniel Webster himself, reveals how Webster and Story coordinated their legal efforts in the *Dartmouth College* case. Story wanted the Court to rule on private corporations’ rights, and Webster wanted Dartmouth’s victory. Story advised Webster to bring three suits separate from the *Dartmouth College* case, all involving state authority over non-charitable corporations, and then coordinated with the circuit court judge so that they could be accelerated to the Supreme Court. The Court never heard these other three cases; there was no need, inasmuch as Story incorporated his views on private corporations’ rights into his *Dartmouth College* case concurrence. While Story was writing his concurrence, Webster sent sources and citations to the Justice to incorporate into his opinion. For more discussion of Justice Story’s coordination with Daniel Webster, see Christopher M. Joseph, *Joseph Story and the Dartmouth College Case*, *supra* note 22, at 24–25.

election, and the newly elected Governor, William Plumer, advocated Thomas Jefferson's vision of a non-sectarian university that prepared young men for vocations beyond the ministry.³⁷ In its *Dartmouth College* decision, the Supreme Court struck down the recent state laws that would have transformed Dartmouth College into Dartmouth University and given the Governor extensive authority in selecting the institution's trustees and overseers. The Court's decision halted the legislative transformation, thereby preserving a small, Calvinist, religious institution that was far less ideologically open and academically ambitious than the "University" Governor Plumer and the Republicans sought.³⁸ Arguably, the case's winners were conventional and narrow-minded, and its losers, broad-minded reformers.

Still, independent of its impact in Hanover, the *Dartmouth College* decision protected *all* private colleges and universities—including those that served or would serve marginalized groups otherwise excluded from higher education in the nineteenth century. It is no coincidence that America's first women's colleges were founded in the decision's wake, beginning with Ipswich and Mount Holyoke in 1828 and 1837, respectively.³⁹ Similarly, though only six Roman Catholic colleges existed before the *Dartmouth College* case, an additional thirty-four were founded in the subsequent three decades.⁴⁰ And, apparently encouraged by the *Dartmouth College* decision, "dozens more religiously affiliated private colleges sprung up throughout New England."⁴¹

The *Dartmouth College* decision's corporate protections deserve renewed historical attention for their role in empowering discrete, insular groups against public aggression or antagonism. In the remainder of this essay, we focus on the history of private colleges established in the nineteenth century for the education of African-Americans. We propose that the *Dartmouth College* case planted a legal seed that, decades later, contributed to the forming and flourishing of institutions

³⁷ STITES, *supra* note 27, at 13 (describing Governor Plumer's belief that it was "mistaken that the great object of colleges was to educate young men for priesthood, rather than to qualify them for the duties of civil life"). See also *id.* at 126, n. 33 (noting that Governor Plumer's admiration for Thomas Jefferson was so profound that he sent Mr. Jefferson a copy of remarks he had written).

³⁸ LYNN W. TURNER, WILLIAM PLUMER OF NEW HAMPSHIRE 1759-1850 247-49 (1962).

³⁹ HELEN LEFKWOITZ HOROWITZ, ALMA MATER: DESIGN AND EXPERIENCE IN WOMEN'S COLLEGES FROM THEIR NINETEENTH CENTURY BEGINNINGS TO THE 1930S 9, 11 (2nd ed. 1984).

⁴⁰ Matthew Garrett, *The Identity of American Catholic Higher Education: A Historical Overview*, 10 J. CATH. EDUC. 229, 230-31 (2006).

⁴¹ JOEL RICHARD PAUL, WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 380 (2018).

devoted to the education of newly-freed men—and, often, women⁴²—in former slave states, despite unparalleled public hostility.

III. PUBLIC EDUCATION AND AFRICAN-AMERICANS AFTER THE CIVIL WAR

Before the Civil War, slavery and segregation categorically foreclosed educational opportunities for nearly all black Americans, though a few institutions of higher learning for black students had been founded in areas of Pennsylvania and Ohio harboring strong abolitionist sentiment.⁴³ At War's end, ninety-four percent of America's black population lived in the former Confederacy and, due to prohibitions against educating slaves, ninety percent of them were illiterate.⁴⁴ Emancipation alone could not materially improve their educational opportunities.⁴⁵

To be sure, public education in the former Confederacy grew significantly after the War. While the North had developed public elementary and secondary schools beginning in the seventeenth century, the South had never systematically established public schools.⁴⁶ White businessmen and small farmers clamored for free public schools for their children but faced class-based resistance from wealthy landowners fearing socioeconomic disruption.⁴⁷

Divided as white Southerners might have been over public education *for whites*, they were united in opposing educational opportunities for their black neighbors. Historians Henry Drewry and Humphrey Doermann detail how “[b]lack schools were burned; teachers and students harassed or attacked; and black parents fired from jobs if their children were known to be attending school.”⁴⁸ Such entrenched and uniform racist hostility blocked nearly all possibility of state-supported education for African-Americans—including elementary and secondary schools—during and, except for the brief period of Reconstruction, after the Civil War.⁴⁹

⁴² HENRY N. DREWRY & HUMPHREY DOERMANN, STAND AND PROSPER: PRIVATE BLACK COLLEGES AND THEIR STUDENTS 44 (2012) (“Colonial colleges [almost all in the North] enrolled only males, whereas in early black colleges, coeducation was common.”).

⁴³ RONYELLE BERTRAND RICARD & M. CHRISTOPHER BROWN II, EBONY TOWERS IN HIGHER EDUCATION: THE EVOLUTION, MISSION, AND PRESIDENCY OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES 8 (2008).

⁴⁴ DREWRY, *supra* note 42, at 34 (2012).

⁴⁵ *Id.* at 34.

⁴⁶ *Id.* at 42.

⁴⁷ *Id.* at 34, 41-43.

⁴⁸ *Id.* at 43.

⁴⁹ *Id.* at 34-36, 43.

In 1862, Congress had passed the Morrill Land Grant Act, which provided federal land for states to create liberal and practical educational institutions.⁵⁰ Sixty-nine land grant schools were quickly founded throughout the United States, creating a national, public higher education network.⁵¹ The Morrill Act was a boon for white Americans in the South. For most black Americans, however, the first Morrill Act never existed in any practical sense. The white Southerners who controlled their states' legislatures and distributed the Morrill Act's resources refused to spend them on black higher education,⁵² just as after Reconstruction they refused to appropriate state tax revenues to support primary and secondary education for black citizens.⁵³

Eventually, Congress responded to Southern legislatures' discriminatory use of federal funds. In 1890, it passed the Second Morrill Act, which required as a condition of federal support that states admit black students to existing white land-grant colleges or create "colleges separately for white and colored students . . . [with an] equitable division" of its funds.⁵⁴ The Second Morrill Act's benefits were limited in the South; there was insufficient federal oversight and enforcement, and the Act

⁵⁰ 7 U.S.C. § 301 et seq. See John A. Moore, *Are State-Supported Historically Black Colleges and Universities Justifiable after Fordice – A Higher Education Dilemma*, 27 FLA. ST. U. L. REV. 547, 550 (2000). For more, see Kristen Broady's discussion, of how although a provision of the Morrill Act withheld benefits from any states currently in rebellion or insurrection against the United States—which included, Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina, Texas, Arkansas, North Carolina, Tennessee, and Virginia—its relevance was short-lived with the War's 1865 conclusion. After the Civil War, these states could and did receive federal land grants, but they continued to forbid black Americans from attending the universities those grants helped create. Kristen E. Broady et al., *Dreaming and Doing at Georgia HBCUs: Continued Relevancy in 'Post-Racial' America*, 44 REV. BLACK POL. ECON. 37, 39 (2017).

⁵¹ *Id.* at 39.

⁵² *The Unique Role and Mission of Historically Black Colleges and Universities: Hearing Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor H. R.*, 100th Cong. 12 (1988) (statement of Dr. Robert L. Albright, President, Johnson C. Smith University).

⁵³ See also DREWRY, *supra* note 42, at 41–42 (discussing how, using perverted logic, state legislatures rationalized their discriminatory refusal to provide public funds for black education by arguing that, since public-school funds came from property taxes and black Americans owned little-to-no property, any black schools should not be allowed access to public revenue; yet whites without property could still send their children to the new public schools, which children of tax-paying black citizens were barred from attending).

⁵⁴ Racial Discrimination by Colleges Restricted, 7 U.S.C. § 323 (1890).

essentially codified the illusory and denigrating concept of “separate but equal.”⁵⁵ Although sixteen Southern and Border states created public colleges for the education of black students, these were grossly underfunded.⁵⁶

Even after the Second Morrill Act, then, Southern state legislatures’ racism foreclosed public higher education. Private higher education remained the only option available to most black Americans, the majority of whom remained in the South.

IV. THE FOUNDING OF BLACK COLLEGES

No historian seems to have connected the *Dartmouth College* decision—and its recognition of private educational institutions’ rights—to the rise of black colleges in former Confederacy and Border states immediately after the Civil War. That said, several scholars have recognized that these colleges existed precisely because they were *private* institutions. Historians Drewry and Doermann hypothesize that “[t]he widespread opposition [to higher education for black citizens during this period] suggests why the private and not the public sector took the lead in providing black education.”⁵⁷ Another scholar, Kristen Broady, agrees that “African Americans in [Southern] states . . . relied on private [historically black colleges and universities] as they were prohibited from attending white institutions,” private or public.⁵⁸

The *Dartmouth College* decision had quickly enshrined the proposition that private corporations—and specifically “private eleemosynary” institutions—were significantly shielded from state government interference.⁵⁹ In this way, decades

⁵⁵ It is notable that Congress, not the Supreme Court, seems to have been the first federal department to approve the concept of “separate but equal” as compatible with the Fourteenth Amendment. Cf. *Plessy v. Ferguson*, 163 U.S. 537, 543-44 (1896).

⁵⁶ Reginald Wilson, *Can Black Colleges Solve the Problem of Access for Black Students*, 98 AM. J. EDUC. 443, 446 (1990) (reporting that the Second Morrill Act resulted in the establishment of sixteen black colleges, which remained “systematically underfunded by both federal and state sources”). See also Travis J. Albritton, *Educating Our Own: The Historical Legacy of HBCUs and Their Relevance for Educating a New Generation of Leaders*, 44 URB. REV. 311, 316 (2012) (“State funding for Alabama’s black land-grant institution remained constant at \$4,000 annually. Unlike its white counterpart, whose state funding averaged \$65,000 yearly between 1900 and 1916, at no time during the period did the black college benefit from special appropriations ‘to meet the growth in enrollment and the advancing cost of maintenance.’”).

⁵⁷ DREWRY, *supra* note 42, at 34.

⁵⁸ Broady, *supra* note 50, at 39.

⁵⁹ See, e.g., *Visitors of St. John’s Coll. v. State*, 15 Md. 330, 374 (1860) (“The leading and controlling case on this subject is that of *Dartmouth College v. Woodward*, . . . argued at great length and with rare ability. The judgment pronounced in it, has been the settled law of the land ever since.”); see

later, the case provided a legal route for black Americans to pursue higher education in a virulently hostile South. Especially between 1862 and 1890, Southern blacks and their supporters embraced the private corporate form the *Dartmouth College* case protected as a tool to defend and advance human dignity.⁶⁰

Despite the enormous challenge of simultaneously establishing primary and advanced educational opportunities, Northern freedmen's societies, religious missionary groups, and black Southern communities, assisted by the Freedmen's Bureau that Congress established in 1865,⁶¹ partnered to charter private schools for newly freed slaves. Many of these started as primary or secondary schools and later evolved into private, higher education institutions.⁶²

Only a few years after Appomattox, the *Dartmouth College* decision's protection of private charitable corporations had transformed the educational horizon of black Americans. Between 1866 and 1870, the number of private black educational institutions, including grade schools and high schools, in the United States increased from 740 to 2,677.⁶³ An 1870 report by the Freedmen's Bureau listed ninety-five "Advanced Schools and Colleges for black Students" (meaning high schools and colleges), almost all of them in former Confederate or Border states.⁶⁴ Some of the most famous and prestigious private black universities were established during this period, including Shaw University, in North Carolina, in

also *Allen v. McKean*, 1 F. Cas. 492, 497 (C.C.D. Me. 1833) (Story, Circuit Justice) (relying on the *Dartmouth College* case, abrogating Maine's annulment of Bowdoin College's charter, and holding that "no authority exists in the government to regulate, control, or direct a corporation, or its funds," if it is an eleemosynary corporation, founded with private monies).

⁶⁰ Broady, *supra* note 50, at 39, 41.

⁶¹ DREWRY, *supra* note 42, at 35–40.

⁶² RICARD, *supra* note 43, at 8. In this way, their development paralleled Dartmouth's. Dartmouth College grew out of Eleazer Wheelock's unchartered "Moor's Charity School," a secondary school that continued to exist for some years even after Dartmouth College began admitting students. STITES, *supra* note 27, at 2–3.

⁶³ THOMAS JESSE JONES, BUREAU OF EDU. DEP'T OF INTERIOR, *The Freedmen's Bureau and Southern Schools*, in NEGRO EDUCATION: A STUDY OF THE PRIVATE AND HIGHER SCHOOLS FOR COLORED PEOPLE IN THE UNITED STATES 38, at 289 (1917), reprinted in DREWRY, *supra* note 42, at 40. See also Wilson, *supra* note 56, at 443 (noting that, although the first college devoted to the education of African-Americans was founded before the Civil War in 1837—Cheyney University in Pennsylvania, "the overwhelming majority were begun after 1865 in response to two concerns: the need to quickly establish institutions to educate the newly freed slaves and the segregationist sentiments of southern educators who opposed integrating blacks into already-existing white schools and colleges.").

⁶⁴ DREWRY, *supra* note 42, at 48, commenting on JOHN W. ALVORD, FREEDMEN'S SCHOOLS, 52–54 (1980).

1865; Fisk University, in Tennessee, in 1866; and Howard University, in the District of Columbia, in 1867.⁶⁵ The historian Reginald Wilson underscores that private black colleges, beyond the reach of prejudiced state governments, continued to “carr[y] the substantial responsibility of educating blacks at the college level” until the late 1930s.⁶⁶

It is true that after the *Dartmouth College* case, state governments, picking up on Story’s caveat in his concurring opinion,⁶⁷ generally adopted a “reserve” provision subjecting all state-issued charters to possible legislative modification.⁶⁸ But we have found no record that legislatures exercised such reserved power upon the private black colleges and universities established in the Civil War’s wake. Southern legislatures seem to have simply ignored these schools.

America’s higher education institutions have evolved dramatically since the 1930s, not to mention since the 1819 *Dartmouth College* decision. The decision’s clear distinction between public and private colleges, whose full significance was probably uncertain in 1819,⁶⁹ has blurred with time.⁷⁰ Today, public and private funds support virtually all U.S. colleges and universities, and non-discrimination

⁶⁵ Moore, *supra* note 50, at 549–50.

⁶⁶ Wilson, *supra* note 56, at 444.

⁶⁷ *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 712 (1819) (Story, J., concurring).

⁶⁸ See also *In re Pennsylvania College Cases*, 80 U.S. 190, 213–14 (1871) (holding that the Pennsylvania legislature had not violated the Constitution’s Contracts Clause when it altered the location of a private college pursuant to a reserve clause in the charter itself).

⁶⁹ See DURYEA, *supra* note 7, at 125–26 (“Until the Dartmouth case the distinction [between private and public colleges] rested on an uncertain foundation, and legislatures continued to approve financial support [to established colleges] and, in turn, when the occasion arose, to intrude into their affairs. . . . [T]he original Dartmouth trustees . . . forced a final determination of the distinction that we now know between private and public higher education.”). But see Whitehead, *supra* note 2, at 337 (arguing that the growth in government funding for colleges after the Civil War perhaps contributed to the “emergence of the private/public distinction” in higher education, which Whitehead believes was a “post-[Civil] war phenomenon.”).

⁷⁰ See, e.g., Thomas A. Barnico, *Dartmouth’s Link to Today’s College Oversight Bills: Supreme Court Held School was Private, not Public*, COMMONWEALTH (June 15, 2019), <https://commonwealthmagazine.org/opinion/dartmouths-link-to-todays-college-oversight-bills/> [<https://perma.cc/AGF2-UFS6>]; John P. Mackenzie, *Yale Head Hits ‘Coercive Power’ of U.S. Funds*, WASH. POST (Feb. 22, 1975) (quoting Yale President Kingman Brewster, Jr.’s Address to the Fellows of the American Bar Foundation, that “the ‘coercive power of the federal purse’ is infringing on the right of private educational institutions to set their own policies”), *reprinted in* 121 CON. REC. S5869, at 5827–28 (daily ed. March 10, 1975).

and other state and federal laws apply equally to all such institutions.⁷¹ Judge Henry Friendly, in a 1968 address at Dartmouth commemorating the sesquicentennial of Daniel Webster's argument, famously subtitled his lecture the "public-private penumbra."⁷²

Still, it appears that in the Civil War's aftermath, the *Dartmouth College* case's recognition of private charitable corporations was pivotal. The protections it guaranteed provided a legal alternative for newly emancipated black Americans who ardently sought education and were denied access to both private white institutions and public support.

* * *

The *Dartmouth College* case did "Refound" Dartmouth College, as the plaque at Webster Hall says, but our traditional appreciation of the decision has been too circumscribed. Undoubtedly, it contributed to the American corporate economy's transformation. And, by creating and protecting the category of private eleemosynary institutions, the *Dartmouth College* decision also had important implications for black Americans' struggle for education. In ways that even Justice Story could not have fully comprehended, the decision would help preempt "undue encroachments upon civil rights."⁷³

⁷¹ Because the guarantees of the Fourteenth Amendment apply only to "state action," the distinction between "private" and "public" colleges was a double-edged sword for African Americans seeking to attend private institutions of higher learning, prior to the enactment of federal civil rights legislation in 1964. For example, as late as 1962, a federal court in Louisiana held that Tulane University was "private" within the meaning of the *Dartmouth* decision because of the private sources of its funding; therefore, the court reasoned, Tulane's overt racial discrimination was not "the action of the State of Louisiana" and not proscribed by the Fourteenth Amendment. *Guillory v. Adm's of Tulane Univ.*, 212 F. Supp. 674, 679, 684 (E.D. La. 1962).

⁷² HENRY FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1969) (published by the University of Texas).

⁷³ STORY, *supra* note 36, at 331.